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Criminalising Contract: does ticket touting warrant the protection of the criminal law?

ABSTRACT

This article analyses the appropriateness of extending the criminal law to breaches of contract, focussing upon ticket touting in the context of sporting events and its legality under the current law. Using international Test Matches organised by the Rugby Football Union and the games played at Rugby World Cup 2015 as case studies, it examines whether the current football-specific provisions of the criminal law should be extended to other major sports and sporting events hosted in the UK. A nuanced definition of 'ticket touting' is introduced, the justifications for the current prohibitions analysed, and the appropriateness of further criminalising such activity considered. The article illustrates that whilst the criminal law is one possible mechanism to tackle this activity, a broader approach to regulation of the secondary market is required that takes account of the needs of event organisers as well as sports fans.

KEY WORDS: Criminalisation, extension of; ticket touting; contract; sporting events; rugby; rights holders.

1 Introduction

The hosting of any sporting mega event creates very specific and distinct legal issues, but one recurring theme across them all is a concern about ticketing strategies and their interrelationship with the law. Of particular concern has been the unauthorised sale of event tickets, ticket fraud,¹ and the sale of counterfeit tickets.² Here, the focus is on the first of these, and in particular on the unprecedented growth in the secondary ticketing market that has been facilitated by online ticket marketplaces. This has seen the more obviously black market activities of 'traditional' ticket touts, described by one author as 'a deviant occupational subculture,'³ move into the mainstream as an example of the operation of the free market economy.⁴ This is epitomised by the current government's position, encapsulated by comments of Sajid Javed MP, the then Secretary of State for Culture, Media and Sport, who described ticket touts as 'classic entrepreneurs'.⁵ This echoes comments of the late Teresa Gorman MP on the free market potential of ticket touting and that a laissez faire governmental approach should prevail:

¹ On theft of tickets, reservation of title and appropriation see, K. Reid and J. Macleod, 'Ticket Touts (or theft of tickets and related offences)' (1999) 63 J.Crim.L. 593.

² See Metropolitan Police, *Ticket Crime. Problem Profile* (online, 2013). Available at: <http://content.met.police.uk/cs/Satellite?blobcol=urldata&blobheadername1=Content-Type&blobheadername2=Content-Disposition&blobheadervalue1=application%2Fpdf&blobheadervalue2=inline%3B+filename%3D%22892%2F804%2FPodium+Report.pdf%22&blobkey=id&blobtable=MungoBlobs&blobwhere=1283606350147&ssbinary=true> [Accessed 7 July, 2015].

³ J. Sugden, 'Inside the Grafters' Game. An Ethnographic Examination of Football's Underground Economy' (2007) 31(3) Journal of Sport and Social Issues 242, at 242.

⁴ See D. Moore, 'The Times they are a Changing: Secondary Ticket Market Moves from Taboo to Mainstream' (2009-10) 11 Texas Review of Entertainment and Sports Law 295.

⁵ N A. Bennett, 'New Culture Secretary Sajid Javid Defended 'Entrepreneur' Ticket Touts' Huffington Post, 10 April 2014, http://www.huffingtonpost.co.uk/2014/04/09/sajid-javid-culture-secretary-ticket-touts_n_5117258.html [Accessed 21 July, 2015].

“[Ticket] touts are street traders. They are not necessarily especially nice people; they may be reprobates, but what they are doing is not illegal and by and large it causes no offence – except to people who seem to object to touts making extra profits. That is pure envy.”⁶

Although ticket sales for certain sports and specific sporting events are, or have been, regulated by the criminal law, the vast majority of sales still fall outside its purview. This article examines the legal frameworks within which Primary Rights Holders (PRHs)⁷ can seek to prevent the unauthorised resale of tickets to the events they organise. This is a crucial and unique point of departure; where other analyses have focussed on the impact of touting on the consumer, here the focus is on the PRH. It begins by examining recent Parliamentary activity and intervention in this area, before providing a working definition of ticket touting and outlining the legal provisions pertinent to the secondary ticketing market. This is particularly important as we argue that the practice of ticket touting is a nuanced one, requiring a typology of touting that underpins a stratified approach to the regulation of its various forms. It proceeds to test the effectiveness of the current regime using rugby as a case study, before critically analysing the justifications for extending the scope of the criminal law. It concludes that whilst it is difficult to argue that criminalisation is a panacea, or indeed justifiable, some specific protection is needed to protect PRHs, particularly where these bodies are seeking to promote a socially inclusive ethos.

2 The current legislative context

Tickets for England rugby union matches are amongst the most sought after in the sporting calendar and sustain a buoyant secondary market, a situation that was replicated for many games at RWC 2015.⁸ Despite this acknowledged problem for the Rugby Football Union (RFU), the governing body of rugby in England, the criminal law protections that are afforded to football,⁹ and have in the past been provided to the Olympic and Commonwealth Games,¹⁰ have not been extended to cover either England home games, or matches at RWC 2015.

In contrast to the government’s position on extending existing provisions, or creating bespoke laws, to criminalise ticket touting, Parliament has debated on a number of occasions legislative proposals that attempt to protect the consumer from being exploited in some way.¹¹ Whilst it is appropriate that the ultimate consumer is the person who has evinced most sympathy, throughout these discussions the corresponding claims of PRHs, that their ticket distribution and pricing policies

⁶ H.C. Deb. col 514, 20 October, 1994.

⁷ The PRH would normally be either a sports national governing body or a private body created specifically to organise an event, for example, the London Organising Committee of the Olympic Games for London 2012 and England Rugby 2015 for RWC 2015.

⁸ D. Hyde, ‘Rugby World Cup: beware 80,000 ‘unauthorised’ tickets touted online, fans warned’ *The Daily Telegraph*, 8 September 2015, available at: <http://www.telegraph.co.uk/news/shopping-and-consumer-news/11849219/Rugby-World-Cup-beware-80000-unauthorised-tickets-touted-online-fans-warned.html> [Accessed, 9 September, 2015].

⁹ See Criminal Justice and Public Order Act 1994 s.166.

¹⁰ See London Olympic and Paralympic Games Act 2006 s.31 and Glasgow Commonwealth Games Act 2008 s.17 respectively.

¹¹ See in particular, the Culture, Media and Sport Select Committee’s four ‘touting summits’ and the related Reports, detailed in S. Greenfield, G. Osborn, and S. Roberts ‘Contradictions within the criminalization of ticket touting: what should be the role of the law?’ [2008] 3 Web J.C.L.I. available at: <http://webjcli.ncl.ac.uk/2008/issue3/greenfield3.html> [Accessed 15 July, 2015].

should also receive protection from unauthorised resale of their tickets, has been ignored.

For example, Sharon Hodgson's Sale of Tickets (Sporting and Cultural Events) Bill 2010-12, sought to limit unauthorised vendors from reselling tickets at more than 10 per cent of their original face value, despite such sales being in breach of their contractual terms and conditions.¹² More recently, cl.23 of Lord Moynihan's Governance of Sport Bill 2014-15 sought to extend Criminal Justice and Public Order Act 1994 (CJPOA 1994) s.166 to sports other than football only where the 'need for a free market in tickets' had been taken into account before a decision was made, again without regard to any prohibition on resales provided by the ticket's terms and conditions.¹³ Finally, the Consumer Rights Act 2015 s.90 imposes a duty on anyone reselling a ticket to a sporting event, including the host online ticketing marketplace if used, to provide sufficient information to the purchaser about the ticket to enable them to make an informed decision about whether to purchase the ticket and at what price, ignoring that such resales are unlawful breaches of the contract entered into between the first purchaser and the PRH.

This confused and confusing approach to ticket touting is caused by it being simultaneously unlawful and yet tacitly encouraged by the state. The focus on protecting consumers who have chosen to engage with touts, rather than on the legality of the activity itself, has required PRHs to provide a convincing rationale for the criminalisation of touting in their sports.

3 Ticket Touting and the Law

At its most basic, ticket touting is simply the unauthorised resale of a ticket. It covers all transactions that take place between two parties where neither is the PRH, the originating ticket distributor, their designates, nominees or agents and which are in breach of the ticket's original terms and conditions. Whilst primarily contractual, it is located within the penumbra of what might be seen as more obviously fraudulent activities and can be linked to wider forms of criminality.¹⁴ This generalised definition covers a spectrum of activity that has the potential to encompass a variety of legal issues. In particular, it covers three main activities that are often discussed together, but which give rise to separate and distinct issues, requiring a more sophisticated typology of touting activity to be adopted: (a) fraudulent resales; (b) speculative resales; and (c) face value resales. Thus, the current generic approach to regulating touting needs to be replaced by a more nuanced regime that is cognisant of, and is able to respond to, these various forms of ticket transfers.

Fraudulent resales are the subset of touting transactions where the unauthorised vendor deliberately misinforms the purchaser about a fundamental quality of the ticket, for example, giving no or incorrect information about the position of the seat in the venue, or failing to declare that the unauthorised sale is a breach of the ticket's terms and conditions that could render it void. Additionally, this

¹² See in particular cl.2 and further, <http://services.parliament.uk/bills/2010-12/saleofticketssportingandculturalevents.html> [Accessed 8 August, 2015].

¹³ See further, <http://services.parliament.uk/bills/2014-15/governanceofsport.html> [Accessed 8 August, 2015].

¹⁴ For example, the point was made by the Metropolitan Police in *Ticket Crime: Problem Profile*, above n.2, that ticket fraud is committed by organized criminal networks (p.5) and further that 'the revenue raised from ticket fraud impacts on communities as it can be re-invested into further criminal enterprises' (p.10).

would include the sale of a counterfeit ticket that is an unauthorised reproduction of an original ticket.

Speculative resales cover situations where an unauthorised vendor of a genuine ticket (whether the original purchaser or a subsequent dealer in the ticket) either purchases a ticket with the intention to resell it at a profit and in breach of its terms and conditions, or enters into a voluntary transaction with a third party for the sale of the ticket in breach of its terms and conditions and for an amount exceeding its face value. Face value resales are where the transaction may technically be in breach of the ticket's terms and conditions, but the vendor does not intend to make a profit; this is often exemplified by the person who can no longer attend a game and who is attempting to sell a 'genuine spare' ticket to another person at no more than the original cost to themselves.¹⁵ As is immediately apparent, this basic typology of touting identifies three distinct transactions, necessitating a differentiated legal response.

Fraudulent resales are already criminalised under the generally applicable provisions of the Fraud Act 2006, Consumer Protection from Unfair Trading Regulations 2008/1277 and Consumer Protection (Distance Selling) Regulations 2000/2334, though their effectiveness as means of restricting these behaviours can be questioned. These provisions are not covered here;¹⁶ the focus is instead on the legally problematic status of speculative and face value resales. These transactions are much more clearly aligned with common perceptions of ticket touting, but are not captured easily or specifically by existing criminal law provisions, except in very limited circumstances. When defined in this activity-appropriate way, a more explicit analysis of whether ticket touting ought to be criminalised that challenges the appropriateness of extending current, or creating new, criminal law provisions to enforce a contract can be conducted.

The primary mechanism for policing ticket touting is contractual. Despite this obvious starting point, the criminal law has an established, though limited, impact on this activity. The first attempt to introduce a criminal offence for selling or offering for sale a ticket for a sporting event at above face value was in 1961,¹⁷ the justification for which was that, 'football supporters are naturally incensed and annoyed by this public display of profiteering, and this nuisance also creates a serious problem for the police.'¹⁸ It was not until the introduction of CJPOA 1994 s.166 that touting tickets for professional football matches was specifically criminalised. This wide-ranging provision makes it an offence for an unauthorised person to: sell; offer to sell; expose for sale; make available for sale by another; advertise; and/or give to a person who pays or agrees to pay for some other goods or services or offering to do so, tickets for designated football matches. This provision was the enactment of a specific recommendation by Taylor LJ in the Final Report into the Hillsborough

¹⁵ Some terms and conditions now provide limited exemptions for face value resales to enable a person to buy tickets on behalf of a group of friends and/or family and be reimbursed by them, for example conditions 11-16 RWC 2015: <https://tickets.rugbyworldcup.com/staticpages/termsandconditions.aspx> [Accessed 16 September, 2015].

¹⁶ See generally M. James, *Sports Law* 2nd edn. (Basingstoke: Palgrave Macmillan, 2013) pp306-314.

¹⁷ 'A Bill to prohibit the sale in public places by unauthorized persons of tickets for football matches and other sporting events at prices higher than the officially advertised price of the tickets, and for purposes connected therewith' 9 & 10 ELIZ 2 429 (Bill 78), introduced by Eric Fletcher (Islington East). If enacted, this would have been known as the Ticket Touting Act 1961.

¹⁸ E. Fletcher, H.C. Deb. 21 February, 1961 Vol. 635 c336-8.

disaster,¹⁹ that as the unauthorised resale of football match tickets could lead to disorder by either breaking down the segregation of rival fans and/or acting as a locus for disorder at the point of sale, touting should be criminalised. As originally drafted, CJPOA 1994 s.166 was a football specific offence, however, during the passage of the Bill through Parliament it was amended to enable the Secretary of State to criminalise ticket touting at other sporting events, though this power has not been exercised to date.²⁰

More recently still, as a pre-requisite of being awarded hosting rights,²¹ legislation was enacted to criminalise the unauthorised resale of tickets for the London 2012 Olympic and Paralympic Games, with similar provisions introduced for the Glasgow Commonwealth Games in 2014.²² These were both clearly based on CJPOA s.166 1994 and its transplantation into a different contextual environment, without a clear and specific justification, has not been without its critics.²³ At neither of these events was there a risk of football-style, or indeed any, disorder occurring, rendering the use of CJPOA 1994 s.166 as a legislative template at least questionable.²⁴

For London 2012, the criminalising of ticket touting was justified on the basis of protecting the (undefined) image of the event. In response to a Freedom of Information Act request, the Department for Culture, Media and Sport provided the following explanation for why ticket touting at Olympic events needed criminalising:

Olympic Games events are very popular and must be protected from individuals seeking to profit by selling on tickets above face value. Laws should both forbid such sales and people from advertising and executing such sales. The touting of tickets is detrimental to the image of the Olympic Games particularly at Games-time. Local law enforcement should be able to take appropriate action against [touts] selling Olympic Games tickets.²⁵

No further explanation was provided about how the image of the Olympic Games could be damaged by ticket touting, nor why this is more of a problem for the Olympics than any other sporting event.²⁶ The further transplantation of the anti-touting provisions to Glasgow 2014 was justified on similar grounds: that it was

¹⁹ Taylor LJ, *The Hillsborough Stadium Disaster (Final Report)* Cm 962 (London: HMSO, 1990), Final Recommendation 70, p.82; 'Consideration should be given to creating an offence of selling tickets for and on the day of a football match without authority from the home club to do so.'

²⁰ CJPOA 1994 s.166(6). See also, N. Parpworth 'Cricket and the Ticket Touting Offence' (2001) 165 C.L.&J. 741.

²¹ IOC, *Technical Manual on Ticketing* (Lausanne: IOC, 2005), XI Obligations Checklist, Ticket Sales, p.26, available at: http://www.gamesmonitor.org.uk/files/Technical_Manual_on_Ticketing.pdf [Accessed 16 September, 2015].

²² Above, n.10.

²³ See M. James and G. Osborn, 'The Olympics, transnational law and legal transplants: the International Olympic committee, ambush marketing and ticket touting' (2016) 36(1) Legal Studies 93.

²⁴ Both the men's and women's Olympic Football Tournaments were specifically covered by an amendment to the existing legislation: art.2(e) Football Spectators (Prescription) (Amendment) Order 2010/584.

²⁵ CMS 106119, see further James, *Sports Law*, above n.16, p.312.

²⁶ This is despite the zealotry with which the IOC generally protects the commercial aspects of its image and iconography, M. James and G. Osborn, 'The Olympic Laws and the Contradictions of Promoting and Preserving the Olympic Ideal' in V. Girginov (ed), *Handbook of the London 2012 Olympic and Paralympic Games* (Abingdon: Routledge, 2012).

required by the Commonwealth Games Federation.²⁷ This lack of a generally applicable rationale is central to the discussion of the appropriateness and efficacy of such transplantations, particularly where, as in rugby, there is a specific philosophy to the RFU's approach to the distribution and pricing of tickets.

4 The RFU, Tickets & Touting

The RFU is committed to an inclusive distribution policy for ticketing at England internationals. Over 50% of tickets for England games are offered to the 'rugby family' (including clubs, county associations and schools), who then distribute them to their members and affiliates.²⁸ The philosophy underpinning the RFU's approach to ticketing is grounded in its desire to protect the sport's values and, more specifically, is a means of promoting social inclusion, rewarding loyalty, building the next generation of fans and trying to create inter-connected levels of support. These approaches are broadly cooperative in their effect, reflecting the cooperative status of the RFU itself.²⁹ Thus, promotion of the sport through access to tickets is integral to its distribution mechanism at the expense of maximising the profit on each sale. As Lord Kerr has noted, 'It is their deliberate policy to allocate tickets so as to develop the sport of rugby and enhance its popularity'.³⁰ This is a clear example of a sport using attendance policy and practice as a driver of social inclusion.

To achieve this goal, the RFU stipulates in its terms and conditions that the resale of tickets above face value constitutes breach of contract, thereby rendering the ticket null and void.³¹ The RFU has also adopted a policy of seeking injunctions against touts and unlicensed corporate hospitality providers, and takes disciplinary action against clubs and others who have distributed tickets in breach of their terms and conditions. This has required it to monitor websites proactively and to proceed against sellers in instances where tickets are offered for resale at above face value. Although this approach is sound in theory, the enduring problem is that touts are able to remain anonymous. From 2010, the RFU made a series of test purchases from the online ticket marketplace Viagago. It discovered that thousands of tickets for that season's England home games had been offered for sale, including blocks of up to 24 tickets and tickets with a face value of £20-£55 being offered for sale at prices of up to £1300.³² Given this, and without the imprimatur of the criminal law, the RFU has had to resort to the much slower and more cumbersome procedures provided by the civil law.

The standard terms and conditions of tickets issued by the RFU state clearly and specifically that they are not for resale unless to persons already known to the original purchaser and where the purchaser is still going to attend the event.³³ In other words, you can only buy tickets for family and friends and ask them to reimburse your expenditure. Furthermore, property in the ticket is retained explicitly by the

²⁷ Glasgow Commonwealth Games Act 2008, Explanatory Note para.1.10.

²⁸ Interview with Angus Bujalski, Head of Legal RFU, Twickenham 9 July, 2015. The valuable information provided informs much of this section in terms of RFU ethos and distribution policy.

²⁹ On the cooperative status of the RFU see Slaughter and May, 'Review of Governance for the Rugby Football Union' (online, 2011) para.1.18, available at: <http://www.englandrugby.com/about-the-rfu/slaughter-and-may-governance-report/> [Accessed 9 September, 2015].

³⁰ *The Rugby Football Union (Respondent) v Consolidated Information Services Limited (formerly Viagogo Ltd) (In Liquidation) (Appellant)* [2012] U.K.S.C. 55, p.2.

³¹ Ibid, p.2. See also the discussion of terms and conditions below.

³² *The Rugby Football Union v Viagogo Ltd*, above n.30, p.3.

³³ See generally: <http://www.englandrugby.com/tickets/terms-and-conditions/> [Accessed 4 September, 2015].

RFU, ensuring that the original purchaser's right to deal with the ticket is significantly curtailed. The inclusion of these conditions in the contract of sale means that the original purchaser cannot sell the tickets to persons unknown to them, nor can they sell them for an amount above the ticket's original sale value, which includes its face value and any relevant booking, administration and distribution fees.³⁴ Any such sale creates a situation analogous to *Marshall*,³⁵ where the defendant was found guilty of theft when reselling discarded day passes for the London Underground outside tube stations.

Criminalising breach of contract in this way gives rise to two linked difficulties: first, does the property 'belong to another' and secondly, whether the transaction is dishonest. The RFU specifically retains property in the tickets and requires the tout to 'retain and deal' with the ticket in a specific way, in particular by not selling it without permission. Provided that reasonable steps are taken to bring such clauses to the attention of the tout, which the RFU has done through the phrasing and profile of the relevant terms, then property in the ticket remains with the RFU under Theft Act 1968 ss.5(1) and (3) respectively.³⁶

The key question then is whether or not the tout acts dishonestly when selling the ticket in breach of these terms and conditions.³⁷ Any dishonesty here would be as against the PRH, which has specifically restrained the tout from selling the ticket, and not against the ultimate purchaser, who is complicit in, although perhaps unaware of, the dishonest element of the transaction. The provisions in Theft Act 1968 s.2 do not apply to touting. In particular, the tout cannot claim that he believed that he had the right to deprive the PRH of the ticket or that he had the PRH's consent to sell the ticket as the stipulations in the terms and conditions make it clear that this is not the case. Thus, as the tout is likely to argue that, 'Whatever others may think, *I* did not consider this dishonest',³⁸ but merely a breach of contract, a *Ghosh* direction will be necessary.³⁹

Particularising this test, it must first be proved that touting is dishonest according to the ordinary standards of reasonable and honest people. If it is, then it must be proved that the tout realised that reasonable and honest people regarded touting as dishonest. The ambivalent attitude that society has towards speculative resales renders it unclear how a jury would address these questions.⁴⁰ A further particularisation of the first question could help: is the speculative resale of tickets dishonest where such resales are contrary to their specific terms and conditions? Although PRHs and many event attendees would say yes, a significant minority may say no.⁴¹

³⁴ Terms and Conditions of Sale paras.11-13, available at: <http://www.rugbyworldcup.com/ticketing/t-c> [Accessed 9 September, 2015].

³⁵ [1998] 2 Cr. App. R 282

³⁶ *Parker v South Eastern Rly Co* (1877) 2 CPD 416. See further *Arnold* [1997] 4 All. E.R. 1 and generally D Ormerod and K Laird, *Smith and Hogan's Criminal Law*, 14th edn. (Oxford: OUP, 2015) p.921.

³⁷ *Ibid.* Ormerod and Laird, p.939 et seq.

³⁸ D Ormerod and D Williams, *Smith's Law of Theft*, 9th edn. (Oxford: OUP, 2007), p.111.

³⁹ *Ghosh* [1982] Q.B. 1053.

⁴⁰ Below, n.45 and 82.

⁴¹ For criticism of this approach and in particular its human rights implications, see Ormerod and Williams, above n.38 p.111.

Thus, *prima facie*, ticket touting appears to be theft,⁴² although any prosecution would be complex, with proving *mens rea* a particular problem, rendering it an ineffective means of regulating the activity.⁴³ Whether or not a PRH is in law at liberty to restrict the ability of purchasers to transfer their tickets has also been questioned and raises further issues around the legal status of event tickets and the property rights that are vested in them.⁴⁴ Evidence submitted to the House of Commons Culture Media and Sports Committee by Campbell Keegan Limited noted that in their sample, ‘...consumers are inclined to view tickets as acceptably transferrable’⁴⁵ and that tickets were perceived as the purchaser’s ‘property’ notwithstanding the actual legal position, though the current phrasing of retention of title clauses makes such a claim much less reasonable to hold.⁴⁶

To address this problem, the RFU sought a Norwich Pharmacal Order⁴⁷ against Viagogo that would supply them with the names and contact details of everyone who had sold an England ticket on the secondary ticketing website.⁴⁸ Before making the application, the RFU provided evidence that it had taken various steps to prevent the resale of tickets to its events at prices above face value. These included strengthening the wording on tickets to enable the revocation of the permission to enter the stadium with a touted ticket and a statement that the permission to enter the stadium would automatically expire where tickets were sold above face value and/or to persons unknown.⁴⁹

As Tugendhat J noted, these approaches were not without their problems, particularly given the size of England’s home ground, Twickenham, which has a capacity of 82,000 spectators. The Order effectively forced Viagogo to reveal the names and addresses of people who sold England rugby tickets on their website, enabling the RFU to identify and, where appropriate, sanction anyone who had

⁴² The decision in *Marshall* is, however, not universally accepted as correct and has not been followed since, see J.C. Smith, ‘Stealing Tickets’ [1998] Crim. L.R. 723 and Reid and MacLeod, above n.1. It is worth noting that Marshall was one step removed from the transactions discussed here as he had not bought the tickets that he was selling from the rights holder, London Underground, and so *may* have been unaware of the relevant terms and conditions. Today, he would be charged under the Fraud Act 2006 s.1, whilst purchasers of sports tickets are made specifically aware of the non-transferability condition.

⁴³ Further problems have been identified with the mental element of CJPOA s.166, see Greenfield, Osborn and Roberts, above n.11: ‘...it is clear that s.166 would fall within a quasi-criminal regulatory offence, rather than one which is “truly criminal” and where a *mens rea* would be imposed.’ Parpworth, above n.20, further notes the ‘statutory silence’ on *mens rea* in s.166 is likely to be a drafting oversight given its prominence in other sections of CJPOA 1994.

⁴⁴ A. Berry, ‘Use of non-transferability clauses to combat touting’ (2013) 11(7) W.S.L.R. 11.

⁴⁵ Campbell Keegan Ltd ‘The Secondary Market for Tickets (Music and Sport). Qualitative Research Report’(online, 2007) available at: http://webarchive.nationalarchives.gov.uk/20121204113822/http://www.culture.gov.uk/images/research/secondarymkt_tickets_qrr.pdf [Accessed 9 September, 2015].

⁴⁶ This issue of the legal status of tickets in terms of property rights is beyond the scope of this article.

⁴⁷ From *Norwich Pharmacal v Customs and Excise Commissioners* [1974] A.C. 133: ‘[i]f through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers,’ at p.175. This is a form of third party disclosure order.

⁴⁸ *The Rugby Football Union v Viagogo Ltd* [2011] E.W.H.C. 764 (Q.B.).

⁴⁹ ‘Legal words will not work by themselves. The automatic expiry or revocation of a licence (if such there be) will not appear automatically on the paper ticket,’ *ibid.* at para.10.

breached their tickets' terms and conditions.⁵⁰ Viagogo appealed both the Court of Appeal⁵¹ and the Supreme Court, where its claims were unanimously dismissed.⁵² A key factor in determining whether granting an Order would be a 'necessary and proportionate' response,⁵³ was the RFU's approach to ticketing. In particular, its argument that the promotion of accessibility to and affordability of tickets to England games was undermined by touting helped to justify why the RFU's ticketing philosophy deserved the protection of the law.⁵⁴

This decision helped to publicise the RFU's ongoing battle to eradicate ticket touting, although in the case of Viagogo problems persist. The company went into liquidation on 26 March 2012, having changed its name four days previously to Consolidated Information Services Limited, and reclassified its business as 'Other professional, scientific and technical activities not elsewhere classified'. The statutory notice of liquidation was posted in the London Gazette (under the CIS nomenclature) and its assets transferred from Viagogo Ltd to Viagogo AG, based in Switzerland, during March and April 2012.⁵⁵ Having relocated outside of the jurisdiction, Viagogo has continued to operate in much the same way as it did previously, further illustrating the myriad difficulties faced by a PRH when enforcing its ticket policy via purely contractual means.

RWC 2015 provided another test for rugby's approach to ticket touting. It is the latest in a series of high profile sporting mega events that have been hosted in the UK in recent years,⁵⁶ and is regularly referred to as the world's third largest sporting event.⁵⁷ RWC 2015 is the eighth edition of the Rugby World Cup and the second time it has been hosted in England,⁵⁸ with a pre-tournament report suggesting that the event could generate up to £2.2 billion for the economy and add up to £982m to national GDP.⁵⁹

⁵⁰ For press reaction at the time, see R. Jones, 'High Court Ruling could kick ticket touts into touch' *The Guardian*, May 7, 2011 available at: <http://www.theguardian.com/money/2011/may/07/high-court-ruling-ticket-touts> [Accessed 1 July, 2015].

⁵¹ [2011] E.W.C.A. Civ. 1585

⁵² Above, n.30.

⁵³ See Lord Woolf in *Ashworth Hospital Authority v MGN Limited* [2002] 1 W.L.R. 2033 and further the list of 10 factors that may be relevant to the exercise of the discretion provided by Lord Kerr in the Supreme Court in *The Rugby Football Union v Viagogo Ltd*, above n.30, at para.17.

⁵⁴ See further, I. Blackshaw 'RFU wins court order in ticket touting case' [2011] 1/2 I.S.L.J.142.

⁵⁵ Anon, 'Viagogo makes itself exempt from UK law by switching to Switzerland' *Musicweek* May 2, 2012, available at: <http://www.musicweek.com/news/read/viagogo-makes-itself-exempt-from-uk-law-by-switching-to-switzerland/048777> [Accessed 1 July, 2015].

⁵⁶ These include the London 2012 Olympic and Paralympic Games and the Glasgow 2014 Commonwealth Games and will be followed by the World Athletics Championships in 2017. The Olympics is seen as one of the world's most powerful brands and is used as a template by many other sporting mega event organisers, see for example A. Ferrand, J-L. Chappelet and B. Seguin B, *Olympic Marketing* (Routledge: London, 2012).

⁵⁷ After the Olympics and football's FIFA World Cup. See further R. Kitson and T. Jenkins, 'Chasing the Chariot' *The Guardian*, 4 September 2015, available at: <http://www.theguardian.com/sport/ng-interactive/2015/sep/04/chasing-the-chariot-in-search-of-the-soul-of-english-rugby> [Accessed 9 September, 2015].

⁵⁸ For Rugby World Cup history generally, see L. Peatey, *A Complete History of the Rugby World Cup: In Pursuit of Bill* (Sydney: New Holland Publishers, 2011).

⁵⁹ Ernest Young, 'The economic impact of Rugby World Cup 2015' (online, 2014). Report prepared for RWC 2015, available at : [http://www.ey.com/Publication/vwLUAssets/EY-rugby-world-cup-final-report/\\$FILE/EY-rugby-world-cup-final-report.pdf](http://www.ey.com/Publication/vwLUAssets/EY-rugby-world-cup-final-report/$FILE/EY-rugby-world-cup-final-report.pdf) [Accessed 27 July 2015].

Ticket sales were buoyant and its ticketing strategy deemed extremely successful. An official press release in March 2015 noted that RWC 2015 was on course to be the most successful rugby world cup ever:

“England 2015 is set to be the most viewed, best-attended and most-engaged Rugby World Cup ever, while a record commercial programme will provide the financial platform for *unprecedented investment in rugby worldwide*.”⁶⁰

The anticipated success of RWC 2015 led to vociferous calls for extra powers to be provided to deal with the issue of ticket touting. Nick Smith, MP for Blaenau Gwent called for the RWC 2015 to be afforded the same protections as are provided for football and were for the Olympics,⁶¹ and for the tournament to be designated an event of national significance:

“Designating the games in such a way would make it unlawful to resell tickets for the tournament. It is urgent that the Government act to protect genuine rugby fans from being exploited by online rip-off merchants. Tickets for the rugby world cup 2015 will be sent to rugby clubs in May and go on general sale this autumn. Even at this late stage, if the Government were to bring forward legislation to make the rugby world cup an event of national significance, Labour would give them their support.”⁶²

The call for the criminal law to be extended went unheeded, requiring England Rugby 2015 to bolster the other options at its disposal.⁶³ When tickets went on sale in September 2014, it was expressly stated that anyone buying a ticket from an unauthorised source could be refused entry to the stadium.⁶⁴ This is reinforced by the terms and conditions incorporated into every RWC 2015 ticket,⁶⁵ which state unequivocally the prohibition on the transferring of tickets and the potential impact of attempting to gain entry to a game with a touted ticket. Condition 11 states specifically that:

⁶⁰ RWC ‘Lapasset predicts special and record breaking RWC 2015’ (online, 2015): <http://www.rugbyworldcup.com/news/62253> [Accessed 7 July, 2015], emphasis added.

⁶¹ This could have been done very simply by using the procedure in CJPOA 1994 s.166(6).

⁶² Hansard 4 March, 2014, column 783:

<http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140304/debtext/140304-0002.htm#14030455000004>. See generally BBC, ‘Bid to change the law for Rugby World Cup ticket touts’ 4 March, 2014 available at: <http://www.bbc.co.uk/news/uk-wales-26433486> [Accessed 7 July, 2015].

⁶³ A. Lewis, ‘Thousands at risk over fake Rugby World Cup tickets’ Sky Sports News online, available at: <http://www.skysports.com/rugby-union/news/12337/9989722/thousands-at-risk-over-fake-rugby-world-cup-tickets> [Accessed, 15 September, 2015]. During the tournament, England Rugby took further steps to prevent tickets being sold for profit and to uphold its tickets’ Terms and Conditions by issuing 600 letters to people offering tickets for sale on secondary ticket websites urging them to channel these through the official resale portal instead. See ‘Rugby World Cup organisers toughen stance on ticket touts and resale’ *The Guardian*, 30 September 2015, available at <http://www.theguardian.com/sport/2015/sep/30/rugby-world-cup-ticket-touts-websites> [Accessed, 14 October 2015].

⁶⁴ See ‘England 2015 urges Rugby World Cup fans to avoid touts’ *The Guardian*, 11 September, 2014, available at: <http://www.theguardian.com/sport/2014/sep/11/rugby-world-cup-2015-england-tickets-touts> [Accessed 7 July, 2015].

⁶⁵ Rugby World Cup Ticket Terms and Conditions, available at: <https://tickets.rugbyworldcup.com/staticpages/termsandconditions.aspx> [Accessed 10 September, 2015].

“Save as set out in paragraphs 12 and 13 below, Tickets are STRICTLY NON-TRANSFERABLE and MUST NOT BE SOLD OR OFFERED, EXPOSED OR MADE AVAILABLE FOR SALE, OR TRANSFERRED OR OTHERWISE DISPOSED. ER 2015 reserves the right to cancel without refund any tickets which ER 2015 reasonably believes have been or are intended to be resold, offered, exposed or made available for sale, or transferred or otherwise disposed of in breach of these Conditions.”

Condition 12 enables a purchaser to sell a ticket to someone personally known to them, provided that they do not charge them more than the original sale price and one ticket is retained for their personal use. Condition 13 allows a purchaser to sell their ticket through the official Ticket Resale Scheme. In May 2015, Consumer Rights Act 2015 s.90 came into force. This provision was designed to assist consumers, in particular secondary purchasers, to navigate the secondary ticket market with increased confidence that they will receive the ticket for which they believe they are paying. However, by requiring all of the key information about the ticket to be published on the secondary ticketing site, and in particular the exact position of the seat within a stadium, PRHs are, in theory, able to void the ticket in accordance with its terms and conditions and identify the original purchaser in order to take appropriate action against them. As a result, touts do not post all relevant information relating to the ticket online.

Thus, the efficacy of the Consumer Rights Act has been questioned both by consumers, who still cannot guarantee that they are going to receive the ticket that they think they are buying, and event organisers, who are unable to prevent their tickets being touted. Following a number of contraventions relating to cricket matches, the England and Wales Cricket Board stated that it is ‘disappointed that the secondary ticketing market is failing to comply with the new legislation’, illustrating that the RFU is not alone in its dissatisfaction with the current position.⁶⁶ The failure of the civil law and consumer protection provisions to prevent touting and to protect either the consumer, as was its aim, or the PRHs, which seem to be absent from Parliamentary discussions, begs the wider question of whether the criminal law now needs to be extended to close this lacuna. In particular, it necessitates an analysis of whether the current regulatory framework allows the criminal law to be extended in this way, and whether such an extension is justifiable.

5 Should the criminal law be extended?

Writing about CJPOA 1994 in this journal in 1995, Ashworth noted the potential impact of a raft of new criminal legislation:

Some believe that the best approach is to leave considerable discretion to courts and practitioners, and that legislative restrictions often cause more injustices than they remove. Others argue that such ready resort to criminalisation to solve what are essentially social problems is lazy, often counter productive, and sometimes a rather empty form of political

⁶⁶ B. Rumsby, ‘Revealed: fans at risk of being ripped off by secondary ticketing scams’ *The Daily Telegraph* 22 July, 2015 available at <http://www.telegraph.co.uk/sport/rugbyunion/rugby-world-cup/11755861/Revealed-fans-at-risk-of-being-ripped-off-by-secondary-ticketing-scams.html> [Accessed 27 July, 2015].

showmanship (“something is being done – we’ve made it criminal”) and which then rebounds on disadvantaged sections of society.⁶⁷

Whilst critics argue that criminalisation often achieves little, one of the recommendations of the Metropolitan Police’s Ticket Crime Report in 2013, itself largely a response to the various ticket crimes experienced at London 2012, was that, ‘consideration must be given to introducing legislation to govern the unauthorised sale of event tickets. The lack of legislation in this area enables fraud and places the public at risk of economic crime.’⁶⁸ Samuels has similarly argued that, ‘simple, universal statutory regulation prohibiting touting would promote legitimate sport, fairness and consumer protection and remove an unhealthy practice.’⁶⁹ This does not, of course, accord with the contrary view that touting is simply a product of a free market economy that should not be criminalised. The secondary ticketing industry has been warned at various points that if it did not provide extra protections for consumers (but not PRHs), government intervention would in all likelihood follow, however, the current government appears to have no appetite for increased regulation.⁷⁰

Where the original justification for the prohibition of ticket touting at football matches was to reduce the potential for incidents of public disorder, the event specific legislation for the Olympic and Commonwealth Games was justified on the more nebulous basis that it was necessary to protect the image of these tournaments. If the criminal law is to be extended to cover speculative and face value resales at other sporting events, then it must first be determined whether these existing justifications apply to, for example, international rugby union matches. If not, then alternative mischiefs must be identified that would justify extending the law.

At international rugby union matches in particular, and more generally across all sporting events, the existing justifications do not apply. Outside of football, there is no issue of disorder that can be considered serious enough to warrant legislative intervention.⁷¹ Further, the justification based on image is too vague to justify criminalisation without further evidence of how an event is damaged by the unauthorised resale of its tickets. The traditional image of the on-street tout hanging around outside a stadium has been usurped to a significant extent by online transactions. These online transactions range from the occasional or bedroom tout buying additional tickets to sell in order to subsidise their own attendance, to a professional tout selling large numbers of tickets as a business operation. Although annoying both to PRHs, that someone is undermining their ticket distribution policy, and consumers, who are required to pay higher costs for their tickets, it is difficult to conceptualise that sufficient damage is caused to the image of the event that touting ought to be criminalised, especially given the prevailing government view that such activity is classic entrepreneurialism.

English law has generally evolved in a liberalist tradition, promoting autonomy of the individual and criminalising activities primarily in order to prohibit

⁶⁷ A. Ashworth, ‘Coping with the Criminal Justice and Public Order Act’ [1995] Crim. L.R. 1.

⁶⁸ Above n.2, at p.4.

⁶⁹ A. Samuels, ‘Tackling ticket touting’ C.L.&J. (2013) 177 (39) 635.

⁷⁰ A. Darnley ‘Ticket touts’ (2007) 18(1) Ent. L.R. N9. On the history of the various ‘ticket touting summits’ see Greenfield Osborn and Roberts, above n.11. See generally on this point, House of Commons Library ‘Ticket touting’ Standard Note SN/HA/4715(2014), last updated 16 January 2014, available at: <file:///U:/My%20Documents/SN04715.pdf> [Accessed 9 September, 2015].

⁷¹ See also Parpworth, above n.20, for a similar discussion in relation to cricket.

the causing of harm to others.⁷² Although there are many other justifications for criminalising conduct,⁷³ identifying a mischief, particularly one that causes individual harm, is always an appropriate precondition for extending the coercive power of the criminal law.⁷⁴ Linked to this, harm to wider society, encapsulated by a welfarist approach, can be used as a similar justification for criminalising an activity.⁷⁵ Thus, it is essential to determine the nature of the mischief caused by speculative and face value resales, or to identify the harm caused by such activities in order to determine whether criminalisation is an appropriate response. If any individual or societal harm can be identified, it must then be determined whether such harm is so serious that it ought to be criminalised as opposed to regulated by the civil law or industry codes of conduct.⁷⁶ Alternatively, the identification of any persuasive reasons for prohibiting the conduct may provide a justification for criminalisation in the absence of a specifically identifiable harm.⁷⁷

Is there an identifiable harm?

In respect of the transactions identified as speculative or face value resales, no obvious harm is caused to the purchaser. There is no loss caused by a face value resale and although the purchaser has paid more than they may have wanted to on a speculative resale transaction, it is impossible to argue that this is either a 'loss' or a 'harm'. Voluntarily entering into a consensual transaction where you are required to pay more than you want to for goods or services (in the absence of fraud or duress) cannot be categorised as a serious harm that can be used to justify criminalisation.

Further, there is no obvious harm to the PRH as they have still received what they demanded for the tickets (even though their face value may be significantly below their clearing and market values), especially where the event is sold out and there are no additional tickets for sale. There is a possible claim that any 'indirect loss' caused could constitute harm. This would include situations where, for example, the secondary purchaser has overpaid for the touted ticket to such an extent that they have less disposable income left to spend at the venue on the match day. However, until further evidence can be provided that proves both the existence and quantification of any such indirect loss, this argument remains at best theoretical.

At the societal level, it is arguable that *Rangos v Revenue and Customs Commissioners*⁷⁸ provides some justification for criminalising ticket touting on the grounds that society is harmed by a tout's failure to pay tax on their earnings as a secondary ticketing business.⁷⁹ In theory, this looks like a strong argument, particularly where the tout is trading on a sufficiently large scale that they can be considered to be operating in the course of business. However, without better data on the size of the unauthorised secondary market, the numbers of people engaging with it and the scale of their activity, ticket touting defined as speculative and face value

⁷² The classic exposition of this approach is J.S. Mill, 'On Liberty' in J. Gray (ed.), *On Liberty and Other Essays* (Oxford: OUP, 1991).

⁷³ See for example, A. Ashworth, *Principles of Criminal Law*, 7th edn. (Oxford: OUP, 2013) chs 1-3 and W. Wilson, *Criminal Law*, 4th edn. (Harlow: Longman, 2011).

⁷⁴ J. Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (New York: OUP, 1984) ch.1.

⁷⁵ Wilson, above n.73, p.37.

⁷⁶ This has been the government's preferred approach for a number of years, House of Commons Library (2014), above n.70.

⁷⁷ D. Kell, 'Social disutility and the law of consent' (1994) 14 O.J.L.S. 121, p.122.

⁷⁸ [2015] U.K.F.T.T. 0262 (T.C.)

⁷⁹ Wilson, above n.73, p.34.

resales causes no easily identifiable or quantifiable societal harm that requires a criminally sanctioned prohibition.

Are there any identifiable mischiefs that need to be restricted?

In the absence of any specific identifiable harm, criminalisation can be justified if it is to prevent wider mischief that offers a serious threat to the social structure.⁸⁰ If a purchaser can only attend an event by purchasing a touted ticket, then they are forced to engage with the secondary market and all of the risks that this entails; their desire to attend is financially exploited by the tout and they are exposed to a risk of fraud and engaging with organised criminals. Further, when tickets to a sporting event are touted, it undermines the event organiser's chosen ticket distribution mechanism, particularly if this has been developed to promote social inclusion. This can result in restricted access to tickets that are deliberately sold below market value for socially beneficial reasons and may result in damage to the event's image by making it appear that the PRH is only interested in those who can afford to attend, not those that it claims it wants to encourage to attend. Finally, society as a whole is exposed to a range of criminal activity through ticket touting: there is a potential for disorder at the point of sale and when the secondary purchaser is refused entry to an event on a voided, touted ticket (though at a greatly reduced risk in sports other than football); touting can facilitate links to wider organised crime networks who are trading on online secondary marketplaces; and it exposes citizens to the risk of fraud.

This combination of societal ills could be used to claim that ticket touting is promoting a level of social disutility that justifies its criminalisation as an approach of last resort. These harms, if they can be supported by evidence, could be claimed to undermine the social, cultural, financial and sporting benefits of a PRH's ticketing and pricing policies. This line of argument would be particularly pertinent for a body such as the RFU: it has a clear and distinct policy for the distribution and pricing of tickets to England internationals; it has a cooperative legal structure ensuring that it is working for the benefit of its members through its ticketing policies; it has taken specific and proactive steps to protect its ticketing policy, enforced the relevant terms of conditions and disciplined those who are found to be in breach. Thus, if the RFU is unable to make a convincing case for criminalising the unauthorised resale of its tickets, then it is unlikely that any PRH will be able to.

The difficulty with each of these potential mischiefs is that individually, they do not reach the level of seriousness usually required for criminalisation, nor when taken together do they offend the collective consciousness sufficiently,⁸¹ although a PRH such as the RFU might want to construct an argument based around the social utility and value of sport and their specific ticketing policies and procedures in support of this. In contradistinction, the general public's understanding of tickets may militate against such claims, as was demonstrated in the evidence provided by Campbell Keegan Ltd to the DCMS. Here it was found that although a majority of people would welcome restrictions on the amount that could be made on a speculative resale, a similar number of respondents believed that they should have the right to sell a ticket at any price should they choose to.⁸² Indeed, it is to some people a badge of honour to have paid over the odds to attend a high profile sports fixture, highlighting a general ambivalence of many fans to the legality of touting.⁸³ This confused attitude

⁸⁰ Wilson, above n.73, p.39.

⁸¹ Wilson, above n.73, p. 38

⁸² Campbell Keegan Ltd, above n.45.

⁸³ Ibid. p17.

towards ticket touting, and indeed what a ticket actually denotes, makes it difficult to justify extending the criminal law in these circumstances, notwithstanding that various PRHs might welcome this.

6 Conclusion

In normal circumstances, the law of contract provides the appropriate framework for regulating promise-breaking, which is in reality all that the tout is doing; they are breaking their contractual promise to the PRH not to sell the ticket.⁸⁴ State coercion is reserved for activities that pose such a serious threat to the integrity of society that a publicly grounded response is required. This high threshold provides a significant barrier to arguments that ticket touting ought to be considered to be of sufficient seriousness to warrant criminalisation.⁸⁵ Despite this, the development of the criminal law is often politically contingent. Thus, where there is a political will, as there was for both the Olympic and Commonwealth Games, legislation will follow.⁸⁶ The dominant narrative of the current government, however, is that the secondary market is beneficial to consumers and should not be legislated out of existence, instead preferring that the industry be self-regulating.⁸⁷

Taken individually, the aforementioned mischiefs and harms do not appear to be sufficient to justify criminalisation. Taken as a whole, an argument can be posited that ticket touting is sufficiently harmful, or creates sufficient social disutility in some cases, to warrant more specific regulation if not criminalisation. Resales to friends and family at face value ought not to be criminal as it is socially useful for family, friends and community groups to attend events together, as is recognised in the RFU's own terms and conditions, illustrating that a nuanced and stratified approach to the various levels of ticket touting is necessary.

A stronger argument for criminalisation can be presented in respect of speculative resales, however, if legislative form were to be followed then a provision approximating that found in CJPOA 1994 s.166 is likely to be enacted. This in turn raises concerns about the appropriateness of using a provision designed to eliminate a specific mischief in a specific context in a very different sporting, social and cultural setting. Such dangerous transplants can result in inappropriate criminalisation in the absence of careful consideration about how and why an activity needs to be regulated by the state.⁸⁸

It is clear that the rights of PRHs are currently overlooked and are in need of significant reinforcement. Consumer protection has become the dominant narrative, resulting in what appear to be the easily avoidable demands of Consumer Rights Act 2015 s.90. This provision wilfully ignores the position of the PRH and by doing so, Parliament is effectively endorsing breach of contract on the part of the tout. For event organisers, the existing protections are insufficient and criminalisation for some aspects of touting is in need of serious consideration. In making this determination, the tension between whether touting is an activity to be supported or outlawed needs to be resolved. PRHs need to provide a robust and convincing narrative illustrating that the harm caused to them warrants criminalisation before the Government finally recognises that the transfer of tickets is a nuanced activity that cannot be viewed purely as a free market transaction.

⁸⁴ Wilson, above n.73, p.39.

⁸⁵ Feinberg, above n.74.

⁸⁶ Ashworth, above n.73 p.55.

⁸⁷ House of Commons Library (2014), above n.70.

⁸⁸ See James and Osborn, above n.23.